No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant,

vs.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Husband replies to arguments raised in the Wife's brief in opposition and, selectively, to objections raised in each of two amicus briefs.

I. Re the war powers of the Congress

The federal enactments here at issue are grounded in the war powers of the Congress, principally Art. I, Sec. 8, Cl. 12 of the Constitution—the power "to raise and support armies."[1] Because of this source of power the preemption argument is here stronger than in *Hisquierdo v. Hisquierdo,* 439 U.S. 572 (1979), where preemption was found in a conflict between federal law grounded in Commerce Clause considerations and California's community property scheme. Different and stronger policy considerations apply, requiring a greater degree of uniformity in application, when the federal legislation derives its authority from the war powers of the Congress.[2]

The war powers lie exclusively with the Congress.[3] The power exists in peacetime as much as in war.[4] The emphasis is equally on the "support" of armies as upon raising them;[5] and the authority to "support" includes compensa-

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[1]Other provisions in the Constitution furnish the Congress and the President with supplemental powers to meet the varied demands of war. The Preamble refers to the desire of the people to "provide for the common defense." In Article I, Sec. 8, the Congress is assigned the power to "provide for the common defense"; "to declare war"; to provide and maintain a navy; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. In Article II, § 2, Cl. 1, the President is designated Commander in Chief of the Army and Navy of the United States. See, *Lichter v. United States,* 334 U.S. 742, 744 n. 3 (1948).

[2]*Peel v. Florida Dept. of Transp.,* 443 F.Supp. 451, 458 (N.D. Fla. 1977), aff'd 600 F.2d 1070 (5th Cir. 1979).

[3]*United States v. Tarbel,* 80 U.S. 597, 600 (1872).

[4]*Houze v. United States,* 272 F.2d 146, 148 (9th Cir. 1959); *Bertelson v. Cooney,* 213 F.2d 275, 276-77 (5th Cir. 1954).

[5]*Lichter v. United States,* 334 U.S. 742, 755-56 (1948).

tion to be accorded to Army members.[6] When the Congress passes legislation under such constitutional authority, it is exercising its supreme power. "When [this power] is in action it is transcendent;"[7] "broad and sweeping;"[8] and necessary for "the protection and preservation of the nation itself."[9] Other constitutional rights are subordinated to the war powers.[10] Implied exceptions to an act of Congress grounded in such authority will not be recognized.[11]

Here, California may have a Tenth Amendment interest in regulating the domestic relations between husband and wife of domiciliaries within its borders. But that interest

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[6]"[The Congress] can determine, without question from any state authority, . . . the age at which the soldier shall be received, and the period for which he shall be taken; the compensation he shall be allowed. . . . No interference with the execution of this power of the National Government . . . by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service." *United States v. Tarble,* 80 U.S. 597, 599-600 (1872).

[7]*Saint Johns River Shipbuilding Co. v. Adams,* 164 F.2d 1012, 1015 (5th Cir. 1947).

[8]*United States v. O'Brien,* 391 U.S. 367, 377 (1968); *Lichter v. United States,* 334 U.S. 742, 755-758 (1948); *United States v. Boardman,* 419 F.2d 110, 112 (1st Cir. 1967), cert. denied, 90 S.Ct. 1124 (1970).

[9]*Clay v. United States,* 397 F.2d 901, 912 (5th Cir. 1968).

[10]War powers prevail over a state's Tenth Amendment contentions, *United States v. Oregon,* 366 U.S. 643, 649 (1961) ("Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power."); over Tenth and Eleventh Amendment rights, *Peel v. Florida Dept. of Ed.,* 600 F.2d 1070 (5th Cir. 1979); First Amendment rights, *United States v. O'Brien,* 391 U.S. 367 (1968); *Jennings v. Illinois Office of Ed.,* 589 F.2d 935, 936 (7th Cir. 1979). *See,* also, *United States v.* MacIntosh, 283 U.S. 605, 622 (1931).

[11]*Case v Bowles,* 327 U.S. 92, 102 (1946).

is slight as applied to the pay of Army members. Unlike the retirement benefits of railroad workers in *Hisquierdo,* who were employed by *private* railroad employers, we are here dealing both with the pay of Army members in active service and the retired pay of Army retirees subject to recall—all paid directly by the Congress.

There is no argument that an essential function of State government is here involved; and even if that were so, where war powers are involved the "states' power . . . must be in subordination to the power of Congress . . . in order to carry on war."[12]

> "[I]t was never intended to limit the war powers of Congress nor its right to exact public service from all when necessary to meet the public need, Congress being the sole judge of the necessity and extent thereof. [Citation omitted.] Congress is expressly authorized to declare war and to provide for the common defense. These powers necessarily carry with them the power to say who shall serve in the armed forces, and in what circumstances."[13]

Because exercise of the war powers is exclusive to the Congress, the only question here involved is whether the Congress deferred to state community property principles in legislation relating to Army pay; or, more particularly, whether the Congress accommodated the creditor interest of an ex-spouse claiming a property interest in the husband's Army retired pay, when the Congress protected the pay of Army officers and enlisted men in 37 U.S.C. §§ 701 (a) and (c), as modified by 42 U.S.C. §§ 659(a) and 662(c).

There is no recognition of state community property principles in any statute of Congress relating to Army pay. Accordingly, Congress did not so defer to California.

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[12] *Id.* at 100.

[13] *Bertelson v. Cooney,* 213 F.2d 275, 276-278 (5th Cir. 1954).

II. Re implications which attend a conclusion that an ex-spouse has a true property interest in the husband's army retired pay

The Wife (br. 16) and Amici (Memb.Cong. 38-39) challenge Husband's contentions.

(1) Husband argued that a consequence of allowing an ex-spouse to claim an interest in the Army retired pay would be to allow the ex-spouse to transfer her property by testamentary disposition. In *Miller v. Miller,* 609 P.2d 1185 (Mont. 1980), cert. petition docketed (1980), the Court had one issue before it:

> The decree provided that the wife's share in the pension should be paid monthly as it was received by the husband. Furthermore, it provided that in the event the wife predeceased her husband, that the pension should pass to her estate.
>
> • • • • •
>
> [T]he husband argues that it was error for the trial court to rule heirs of the wife could inherit her interest in the military pension. We find no basis to distinguish the wife's interest from other marital assets which may be distributed by the trial court. . . . The court order provides the wife's share in the husband's retirement will be taken out of his monthly payments as he receives them. The husband's obligation lasts only so long as he continues to receive government retirement benefits. Thus, the heirs of the wife can share in these benefits only while the husband is living. We affirm the trial court's order in this respect.[14]

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[14] *Russell v. Russell,* 605 S.W.2d 33 (Ky.App. 1980) held that federal law preempted Kentucky from finding that Army retired pay was divisible at divorce. The opinion addressed the issue of testamentary disposition as follows (605 S.W.2d at 36):

> We cannot rewrite the federal statutes to permit military retirement pay to become a property right of ex-spouses. If we could, a portion of the retirement pay could be awarded to the divorcing spouse and become that person's absolute property. If that person remarried and predeceased the re-

Ultimately, it is not important whether California law coincides with that of Montana in acknowledging the right of the ex-spouse to make a testamentary disposition of her property interest in the husband's Army retired pay. California might well adopt the Montana conclusion. The larger issue is, rather, whether the Congress has left the matter to California to decide. If it has not, the current coincidence between the result under Federal law and the result obtained by California pursuant to its peculiar state law property concepts is irrelevant. In these circumstances, "coincidence is as ineffective as opposition."[15]

(2) Husband contended (brief 32-33) that if an Army member refused to retire after becoming obligated to do so and insisted upon continuing his Army service, an ex-spouse might well have a claim against him under California law for depriving her of her property right.

In re Marriage of Luciano, 104 Cal.App.3d 956, 164 Cal. Rptr. 93 (1980), the ex-spouse complained that the California divorce decree allowed her former husband to determine when he might retire from the Air Force. The ex-spouse contended *she* should have the right to determine when she would begin to collect her property interest in the husband's retired pay and that it should not matter whether the husband chose to retire from the military.

The Court of Appeal agreed. It determined that the ex-spouse need not wait to collect her interest in retired pay until the husband actually retired.[16] The Court further

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tiree, the absolute property right would continue to that person's heirs or designated beneficiary. Such a result is totally inconsistent with the intent and the provisions of the federal statutes.

[15]*Pennsylvania v. Nelson,* 350 U.S. 497, 504 (1956). See, Goldberg, "Is Armed Services Retired Pay Really Community Property?" 48 Cal.St.Bar Jour. 13, 89 (1973).

[16]"[W]e conclude and hold that the trial court abused its discretion in providing that Dorothy must wait until Ferdinand actually retires before commencing to collect her share of the pension. To uphold the trial court's ruling as to the

noted that the trial court could not adjust alimony to the ex-spouse in exchange for allowing the Air Force officer the right to determine when he wished to retire. The Court concluded that the trial court should issue an order "that the non-employee spouse is the one who has a choice as to when his or her share of the pension [i.e., Air Force retired pay] shall begin. This election can be made at any time after the pension is matured by motion in the trial court by the non-employee spouse."[17]

(3) Husband argued (br. 34-35) that since an ex-spouse armed with a community property award is a creditor, her divorce award acknowledging her property right in the husband's army retired pay would propel the former member to march from the divorce court to the federal courthouse to seek relief in bankruptcy.

In *Ramsey v. Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975), the divorce court acknowledged a property interest in the wife in the husband's Army retired pay. Less than four months after the judgment was entered against him in Idaho, the husband filed for relief in bankruptcy in the Northern District of California. Relief was granted and the debt to the ex-spouse discharged. *Ramsey v. Ramsey,* 612 F.2d 1220 (9th Cir. 1980).

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time Dorothy is to commence receiving her portion of this community asset would give Ferdinand the option of determining the receipt by Dorothy of her own property which would be basically unfair. The employee spouse cannot by election defeat the non-employee spouse's interest in the community property by relying on a condition solely within the employee spouse's control." 164 Cal.Rptr. at 95.

[17]The *Luciano* case has been followed and expanded upon in the more recent case of *Gillmore v. Gillmore,* 113 Cal.App.3d 319, 169 Cal.Rptr. 811 (1980). There, the Court held that a husband who refuses to retire must pay damages to the ex-spouse in an amount equal to what she would have received as her property had he retired. The Court rejected the husband's defense that such a result forced the husband to retire when he did not wish to do so. The ex-spouse's property interest in the husband's retirement benefits constituted a consideration more worthy of state protection.

III. Re policy considerations which illuminate and ultimately determine the central issues

Because the Federal enactments rest upon the war powers of the Congress, national interests are here to be promoted. These national interests require uniformity of result throughout the states.

A. Attracting and retaining career Army personnel

The Army retiree must have control of his retired pay even more so than the railroad worker considered in *Hisquierdo*. For, without such control, the basic Congressional objective—to get people to volunteer for, remain in, and then leave the Army in the middle of their careers—will be difficult to achieve. For obvious reasons, it is far more difficult to achieve such personnel objectives with respect to career recruitment for Army service than for other occupations.

The Army member must reside where the Army sends him. Whether his retired pay is reduced drastically thus depends on whether he (or his spouse) happens to be located in one of the eight community property states at the time of divorce. The incentive to remain or to leave the Army in 20 years should not depend on this fortuitous fact. The result should be uniform. Drastically reducing the incentive depending upon the place of assignment at the time of divorce is not consistent with underlying Federal objectives.

There is a greater need for high retirement incentives offered to the Army officer than to the railroad worker in *Hisquierdo*. But it is difficult to attract individuals to an Army career, when Army pay lags significantly behind pay in private industry.[18] This situation is aggravated by mandatory retirement provisions after 20 years.

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[18]Pay for military personnel has notoriously lagged behind that of private industry—even in an all-volunteer Army. This has always been the case and is likely to continue. See, e.g., Griffiths, "Retention of Highly Trained Poses Serious Problem," *Aviation Week & Space Technology* 42 (Nov. 5, 1979). Griffiths, "Retaining

There is an element of potential danger associated with an Army career which cannot be ignored. There is more discipline in the Army and less freedom than in other occupations. There is the certainty of being transferred from place to place, interfering with normal home life. There is the possibility of recall to active service after retirement, just when a start has been made by the retiree in a civilian job or in his own business. All in all, the *only* economic factor as to which Army life may be superior is retired pay. And this relates to the serviceman and not to his spouse. It is he who must want to remain in the service for 20 years (and usually no longer).

It may be overreaching to claim that the retention in the service of trained and experienced Army members is more important to the national government than the retention of civil service personnel. But Army personnel are essential to the welfare of the nation. The difficulty in enlisting and retaining sufficient numbers of qualified people for the Army makes it *more* important that such personnel have additional retirement incentives than civil service personnel.

B. Providing subsistence to the Army retiree as a matter of national pride

A second purpose of retired pay must be to assure the financial solvency of the Army retiree and to provide for him at least at a subsistence level. Men who have served their 20 years in the Army and who, upon forced retirement, are left without means, without training for a civilian job, or hope become dangerous to the nation. Most importantly, a nation cannot take pride in its armed forces if retired members of its army must line up for food stamps.

C. Perceptions of fairness

To recruit and retain career volunteers into the Army it is not sufficient that the retirement system be fair; it must

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Skilled Keyed to Quick Fixes," *Aviation Week & Space Technology* 43, 45 (Nov. 19, 1979). Benefits help bridge the gap.

also be perceived by Army members to be fair. The morale of Army members depends upon such perception.

From the perspective of the Army member, numerous injustices attend the division of his retired pay at the time of divorce. These injustices may precede the divorce, but are related to the division of the expected retired pay.[19] Unfairness may be perceived when, after divorce, the Army member advances with promotions and increased pay, only to share the incremental benefits with his ex-spouse;[20] when the ex-spouse can transfer her interest in the retired pay by testamentary disposition to strangers; when the ex-spouse can compel the Army member to resign so she can collect her property interest; when the ex-spouse can collect

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[19]*E.g.*: In contemplation of a possible future divorce action, the spouse of the Army member encourages the husband to seek a transfer to a community property state; or, if the husband is stationed abroad, she moves to California, establishes domicile, and starts counting the money she will make from her new property interest thus acquired. Indeed, her new property interest may precipitate the divorce, since now the spouse has options that her new asset has brought her that she did not have before.

It is no answer in this regard to suggest the husband retain his former domicile. Before a divorce court in a community property state, estoppel to assert a foreign domicile may easily be found; and the domicile within the state of only the spouse may block the husband. *Cf. See*, the opinion of the Court of Appeals in this case, J.S. 50-53. In any event, the Army member would need constant legal advice, with every Army transfer, to forestall forfeiting part of his retained pay every time a matter possibly affecting a change in domicile might arise.

[20]The amount of retired pay relates to rank and active duty pay. Assume the marriage lasted 10 years so that the ex-spouse is entitled to one-quarter of the retired pay. If after divorce the Army member secures increases in rank and pay, he increases the amount of his retired pay. But the increase benefits the ex-spouse in part because her interest is determined solely by reference to the longevity of the marriage.

The same analysis applies if the retiree after divorce is recalled to active duty and as a consequence of such recall becomes entitled to greater retired pay.

Army retired pay from each of two Army retirees, whom she might marry in succession.[21]

Fundamentally, however, the greatest concern lies with the unfairness which the Army member perceives when he states that it is he, after all, who trained for and engaged in combat, risked death, suffered in the Army—and not his ex-spouse, who stayed back home. And it is he to whom the Army promised the retired pay and not to his ex-spouse.

D. Recall and defense-posture readiness

The California Supreme Court dismisses the possibility of recall as a remote possibility, one that deserves little consideration in the implementation of state policy concerns.[22] A policy concern of the Congress, however, is to establish and implement a manpower call-up system that allows the President—without further Congressional action —immediately to summon former Army members to active duty.

No matter what may be his post-Army activity or personal situation, the former member is liable to recall "at any time." The Congress reaffirmed this obligation of the former member as recently as December 12, 1980, with the enactment of P.L. 96-513, 94 Stat. 2868, the Defense Officer Personnel Management Act. The Act repeals certain older recall statutes and substitutes a new, comprehensive provision (to be collated as 10 U.S.C. § 688). Section 688(a) provides:

> "Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be ordered to active duty by the Secretary of the

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[21]A spouse divorcing after 10-20 years of marriage to an Army member may remarry another and acquire a new property interest in her second husband's Army retired pay. Indeed, she might wind up with more retired pay than either husband.

[22]*In Re Marriage of Fithian*, 10 Cal.3d 592, 604, 111 Cal.Rptr. 369 (1974).

> military department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.[23]

The Army is currently upgrading and modifying plans to use the retired member as an important personnel resource.[24]

The Congress determined that imposing the risk upon the former member of recall into active service at any time that the Secretary so orders justifies paying him retired pay. It is he who will be recalled and not his ex-spouse. And although the United States now has an all-voluntary Army, the recall statute is conscriptive as to the retiree.

It is for the Congress to raise the Army and to determine the means to do it. It is not for California to promote

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[23]This new provision eliminates the limitation on the President's authority, found in 10 U.S.C. §§ 6481 and 6482, to recall retired enlisted members of the regular Navy or Marine Corps to active duty only in time of war or national emergency. It places the functional authority to order a recall at the level of the Secretary of each military department; and it prescribes that uniform regulations shall spell out detailed procedures. See H.Rpt. No. 96-1462, 96th Cong., 2d Sess. (Nov. 13, 1980), pp. 80, 107-108.

[24]*Army Echoes*, an authorized Army periodical which addresses Army retirees, routinely publishes information concerning developments in the Army recall program. In the May/June issue, vol. XXIV, No. 3, retirees were told about a new "retiree mobilization test program." The September/October 1980 issue, vol. XXIV, No. 5, states that a major revision is forthcoming to Army Regulation 601-10 relating to the mobilization of retired Army members. Retirees are also given information concerning legislation being proposed by the Army to include retirees in mobilization preassignment plans. The November/December issue, vol. XXIV, No. 6, page 4, states that under the retiree mobilization program eligible retirees "with health care or administrative skills [and] residing within 90 miles" of an Armed Forces Examining and Entrance Station are currently being identified for positions that would need to be filled during mobilization.

its value system, through the machinery of its courts, in destructive opposition.

IV. Re § 701(a)

The Wife contends (br. 34) that 37 U.S.C. § 701(a) is an "assignment" rather than an "anti-assignment" statute because the text establishes no prohibition. In the alternative, she asserts § 701(a) applies only to voluntary assignments; the provision does not bar the attachment of Army pay by creditors. These arguments are devoid of merit.

A. Decisional law and prior formulations of § 701(a) make clear the broad scope of the provision as a severe anti-assignment limitation

Statutory authorization in § 701(a) to an Army officer that he may assign his pay "when due and payable" prohibits the anticipation of such pay by assignment before the pay actually becomes due and payable. "Due and payable" appears in commercial instruments and signifies that "the obligation to which it is applicable is then immediately payable."[25]

It is of no assist to an ex-spouse to focus at the time of divorce on funds which will become due and payable to the husband only after the divorce, as his Army retired pay. It is the essence of the divorce decree awarding the spouse a property interest in the husband's *future* retired pay that it anticipates the payment and divides it before the pay has become due and payable.

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[25] "Here, the word 'due' is coupled with the phrase 'and payable'. 'The word payable, when used in connection with commercial transactions, means that which is to be paid rather than that which may be paid.' [Footnote omitted.] We think there can be no doubt, unless the context clearly indicates a contrary meaning, that the phrase 'due and payable' on a specified date means the debt or obligation to which it is applicable is then immediately payable." *Furrow v. C.I.R.*, 292 F. 2d 604, 607 (10th Cir. 1961).

Two state courts which have been asked to construe § 701(a) have given it a strong anti-assignment reading.[26] The Ninth Circuit construed § 701(a) to mean that an assignment can be given effect only when the retired pay "would ordinarily become 'due and payable' in the first instance and not after becoming 'due and payable' as a result of subsequent litigation."[27]

A broad anti-assignment reading is compelled by an examination of the early predecessors to § 701(a). The earliest version which gained Congressional sanction traces back to an 1866 enactment, 39 Stat. 337, 338 (Act of July 28, 1866). There, the Congress ordered that the "Regulations of 1863" (prepared by the then Secretary of War, with the approval of the President) be enforced until the Congress should otherwise direct.[28] These Regulations provided:

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[26]"The right to . . . the retired pay not yet due and payable cannot be assigned, sold, transferred, conveyed, or pledged. *See* 37 U.S.C. § 701(a); 6 C.J.S. *Assignments* § 21." *In Re Marriage of Ellis*, 36 Colo.App. 234, 236, 538 P.2d 1347, 1349 (1975), aff'd 191 Colo. 317, 552 P.2d 506 (1976). *Accord: Fenney v. Fenney*, 537 S.W.2d 367 (Ark. 1976).

[27]*Smith v. Commanding Officer*, 555 F.2d 234, 235 (9th Cir. 1977). In *United States v. Smith*, 393 F.2d 318, 321 (5th Cir. 1968), the Court called the right of the husband to the Army retired pay an "unassignable federally created statutory right." "Moreover, *no serviceman* may assign his pay in advance of the date it becomes due and payable. 37 U.S.C.A. §§ 701(a) and (c). State law, of course, cannot be superimposed upon or take precedence over federal statutes and regulations."

There does not appear to be any case law authority to the contrary. It is surprising that in all the state court decisions in community property states no mention of §§ 701(a) or (c) appears. The explanation for this phenomenon in the divorce context lies in the circumstance that until *Hisquierdo* negated the doctrine, community property states took the position that the ex-spouse claims as an owner and not as a creditor. In light of *Hisquierdo*, the Wife makes no such contention in this case.

[28]The references to these Regulations of 1863 and to the statute appear in 15 Op.Atty.Gen. 271, 272 (1877). The statute mandated the preparation and submission of a report and then stated that "The existing regulations to remain in force until Congress shall

> "No officer shall pass away or transfer his pay-account not actually due at the time, and when an officer transfers his pay account he shall report the fact to the Paymaster-General and to the paymaster expected to pay it."[29]

In this predecessor to § 701(a) the anti-assignment prohibition is stated directly and without any implied negative. The current version of the formulation does not alter the core of the prohibition by phrasing the limitation in terms of permission to assign when the pay is "due and payable."

The prohibition against assignment of an officer's pay was published as an Army regulation at least 15 years before California entered the Union.[30]

B. Section 701(a) bars the attachment of Army retired pay

It has long been understood that Army retired pay cannot be attached.[31] It does not matter that the original basis for such a conclusion was grounded in sovereign immunity considerations. As a practical matter, an ex-spouse cannot attach Army retired pay to enforce a property right which she claims in such pay unless the federal government has consented to such an attachment—and it has not so consented. This conclusion has been reinforced by the 1775 and 1777 amendments to the Social Security Act, 42 U.S.C. §§ 659(a) and 662(c).

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have acted on said report." By 1877 the Congress had not so acted, since the Attorney General stated in his opinion that by virtue of the 1866 enactment the 1863 Regulations had acquired "the force and effect of law."

[29] *Id* at 273.

[30] The 1835 Regulations of the Secretary of War provided that "Officers shall not pass away or transfer their pay accounts for any amount not actually due at the time." The text is quoted in 15 Op.Atty.Gen. 271, 273 (1877).

[31] *Buchanan v. Alexander*, 45 U.S. 20 (1846); *Applegate v. Applegate*, 39 F.Supp. 887 (E.D.Va. 1941); *Cf.* 23 Comp.Gen. 911 (1944).

In light of this supervening barrier to attachment, it makes no sense for the Wife to argue that the key element in an anti-assignment statute is not whether it "anticipates" the benefit, but whether it bars attachment.[32]

Anti-attachment attributes to an anti-assignment statute are in any event implied. The *Hisquierdo* court noted that anti-assignment provisions generally serve to ensure that the benefits created by the Congress actually reach the targeted beneficiary.[33] Here, no less than in § 231(m) considered by *Hisquierdo,* the anti-assignment statute "prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of Congressional policy." 439 U.S. at 584.

Even under California law, it is understood that a statute that makes retirement benefits non-assignable restricts both voluntary and involuntary alienation.[34]

C. When it enacted the 1907 predecessor to § 701(a), the Congress intended to invalidate claims by the assignee against the assignor

The general anti-assignment provision, 31 U.S.C. § 203, generated several early decisions that the prohibition against assignment goes beyond rendering the assignment void as against the debtor; the prohibition also invalidates all legal and equitable claims between assignor and as-

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[32]To the extent railroad retirement is at least in part contributory in nature and railroad employers private organizations, it made cautionary sense for the Congress to provide in § 231m of the Railroad Retirement Act, 45 U.S.C. § 231m, that benefits may not be attached. As for Army retired pay, there is no contributory element; there is no private employer; and a specific anti-attachment provision is redundant when the Congress has not otherwise consented to a garnishment suit.

[33]*Hisquierdo v. Hisquierdo,* 439 U.S. at 584, citing *Philpott v. Essex County Welfare Board,* 409 U.S. 413 (1973); and *Wissner v. Wissner,* 338 U.S. 655 (1949).

[34]"Nonassignability . . . operates as a defense against creditors." *Ogle v. Heim,* 69 Cal.2d 7, 14, 69 Cal.Rptr. 579, 583, 442 P.2d 69 (1968).

signee.[35] These decisions must have formed the context and conceptual background within which the early predecessors to the current § 701(a) were adopted and understood.[36] There is no reason to believe the Congress intended a result different from that declared for § 203 to govern claims covered by the predecessor to § 701(a).[37]

D. The sweeping scope of § 701(a) is implied in its applicability to active duty pay

Section 701(a) protects both active duty as well as retired pay. The "pay" in § 701(a) is specified in 37 U.S.C. § 101(21) as including "basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay." Accordingly, the pay of the Army retiree in peacetime is no less protected by § 701(a) than the pay of the active duty officer in time of war.

The Congress has been careful to protect the serviceman in time of war against the claims of creditors.[38] The notion

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[35]*National Bank of Commerce v. Downie*, 218 U.S. 345 (1910); *Nutt v. Knut*, 200 U.S. 12 (1906); *Spofford v. Kirk*, 97 U.S. 484 (1878).

[36]No reason appears why § 203 should not apply directly to bar the claim of an ex-spouse in Army retired pay. See, 15 Op.Atty.Gen. 270 (1877). The text of the Act would appear sufficiently broad in scope to apply.

[37]The standard of 31 U.S.C. § 203, making assignments "void", is the standard also set out in 37 U.S.C. § 701(c), making assignments by enlisted men "void." There is no indication that the Congress intended a lower degree of protection to attend retired pay targeted for an officer as opposed to an enlisted man (prior to the pay of an officer becoming due and payable). Without a rational purpose for such a distinction, a conclusion that the ex-spouse of an officer may enforce a state award for an interest in the husband's Army retired pay, while the ex-spouse of the enlisted man cannot, would be open to Due Process challenge.

[38]See Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1128, 50 USC App. §§ 510-536. Section 510 states it is the "requirements of the national defense . . . to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States."

that the Congress accommodated involuntary attachment in § 701(a) of an officer's active duty pay in time of war is a construction of the section which would do damage to clear national interests. The taking of Army pay by a creditor of an officer should not be allowed as an implied exception to § 701(a). Implied exceptions are disfavored where the Congress has acted under its War Powers.

E. When the early predecessors to § 701(a) were enacted, an anti-assignment statute covering specified property would have been understood as barring a claim by an ex-spouse for her community property share in that property

When the Congress raised the Regulations of 1863 into law (by statutory approval in 1866) and when it enacted the 1907 predecessor to § 701(a), an ex-spouse in California did not have a vested interest in community property. Legal title to the community property was in the husband. He alone controlled the property and the spouse had "no right or title of any kind in any specific property, but a possible interest in whatever remains upon a dissolution of the community otherwise than by her own death."[39] That possible interest was not the "present and existing" interest in community property which Civil Code § 5105 now declares. The interest of the spouse was changed and became equal, present and existing during the marriage only when the predecessor to § 5105 was enacted in 1927.[40]

Until 1927, the spouse's possible interest during the marriage was a mere expectancy. Upon death of the husband, she took as an heir and paid inheritance taxes. Most importantly, upon divorce she took her community property interest by assignment of title to the property by the husband or judicially mandated assignment.

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[39] *Estate of Burdick*, 112 Cal. 387, 44 P. 734, quoted in *Stewart v. Stewart*, 199 Cal. 318, 331 (1926).

[40] That predecessor to § 5105 appeared as § 161a, added by Cal. Stats. 1927, c. 265, p. 484, § 1.

That the wife had to take her interest by assignment leaves no doubt that the anti-assignment texts of the 1866 and 1907 predecessors to § 701(a) barred the claim of an ex-spouse in the husband's Army retired pay. Although California law changed following the 1927 Civil Code amendments, there is no indication that § 701(a) was altered by the Congress to keep conceptual tandem with changes in California law concerning the present and existing interest of a spouse during the marriage in community property.

V. Re other matters as to which the wife errs

A. Contrary to Amici (NOW 16), the trend of state decisions after *Hisquierdo* has been against division of Army retired pay.[41] Even before *Hisquierdo* several states had already determined that an ex-spouse had no property interest in the former member's retired pay.[42]

B. Decisions favoring divisibility of retired pay are not of ancient vintage. They have all come down since the husband joined the Army.[43] Indeed, the flurry of pen-

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[41]*See, Hill v. Hill,* .... Md. ...., ... A.2d .... (Md.Ct. App., No. 1636, decided Jan. 7, 1981), opinion reproduced in 7 Fam.L. Rptr. 2173 (Jan. 27, 1981); *Hiscox v. Hiscox,* 385 N.E.2d 1166 (Ind.App. 1979); *Russell v. Russell,* 605 S.W.2d 33 (Ky.App. 1980); *Light v. Light,* 599 S.W.2d 476 (Ky.App. 1980); *Paulsen v. Paulsen,* 601 S.W.2d 873 (Ark. 1980); *Cose v. Cose,* 592 P.2d 1230 (Alaska 1979) cert.pet. docketed, 100 S.Ct. 2149; *Baker v. Baker,* 421 A.2d 998 (N.H. 1980). *Cf., Arrambide v. Arrambide,* 601 S.W.2d 197 (Tex. Civ.App. 1980).

[42]*Ellis v. Ellis,* 36 Colo.App. 234, 538 P.2d 1347 (1975), aff'd 191 Colo. 317, 552 P.2d 506 (1976); *Fenney v. Fenney,* 537 S.W.2d 367 (Ark. 1976); *Savage v. Savage,* 374 N.E.2d 536 (Ind.App. 1978); *Howard v. Howard,* 196 Neb. 351, 242 N.W.2d 884 (1976); *Baker v. Baker,* 546 P.2d 1325 (Okla. 1975).

[43]*In re Marriage of Fithian,* 10 Cal.3d 592, 517 P.2d 449, cert. denied, 419 U.S. 825, established the doctrine in California only in 1974. In Texas, three appellate decisions held that retired pay was a mere expectancy and hence not divisible as a community property asset upon divorce. *Bright v. Bright,* 531 S.W.2d 440 (Tex. Civ.App. 1975); *Lumpkins v. Lumpkins,* 519 S.W.2d 491 (Tex.

sion cases in California involving public employees began only with a 1949 legislative change, which, by implication, approved the divisibility of state government pensions.[44]

C. Federal tax decisions do not represent Congressional acceptance of the divisibility of Army retired pay. The arguments of Amici (NOW 19-20) are inapposite:

> "State law may control only when the Federal Taxing Act, by express language or necessary implication, makes its own operation dependent upon state law."[45]

In each of the cases noted in the Amicus brief, this was the case.

D. The Wife's jurisdictional objections are wide of the mark. It appears directly from the opinion of the California Court of Appeals that the state's community property laws, as applied to the Husband's retired pay, were drawn into question as repugnant to the federal scheme of military retirement benefits, and the decision of the Court was in favor of the validity of these laws. J.S. 57. The specific state statute is identified in the opinion as Civil Code § 4803 which establishes the regime of quasi-community property. J.S. 46-47. When the question of validity of the statute appears to have been actually considered and decided by the state court, it is not necessary to inquire how and when the question of the validity of the statute was raised.[46]

Civ.App. 1975); *Davis v. Davis*, 495 S.W.2d 607 (Tex.Civ.App. 1973). Only in 1976 did the Texas Supreme Court disapprove these decisions and hold retired pay divisible in *Cearley v. Cearley*, 544 S.W.2d 661.

[44]*See, Phillipson v. Bd of Admin.*, 3 Cal.3d 32, 40, fn. 6, 89 Cal. Rptr. 61, 66, 473 P.2d 765 (1970), referring to former § 161b of the Cal. Civ. Code, now § 21210 of the Cal. Government Code.

[45]*Burnet v. Harmel*, 287 U.S. 103, 110 (1932). *See also, United States v. Mitchell*, 403 U.S. 190, 197 (1970).

[46]*Charleston Assn. v. Alderson*, 324 U.S. 182, 185-86 (1944) and cases there cited.

In his supplemental brief to the Court of Appeal of July 3, 1979, the Husband argued that 37 U.S.C. § 701(a), as modified and supplemented by 42 U.S.C. §§ 659(a) and 662(c) bars the applica-

E. Community property states are not free, as they believe, to decide this controversy involving conflicts with federal law within the limited horizons of local law. Here, incompatible doctrines of local law must give way to provisions of federal law grounded in War Powers considerations.

Federal law governs concerns affecting nationwide federal programs.[47] Here, federal interests are sufficiently implicated to warrant the protection of federal law.[48] Even apart from considerations of uniformity, the application of state community property laws to Army retired pay frustrates specific objectives of federal programs. This Court must accordingly "fashion special rules solicitous of these federal interests."[49]

VI. Conclusion

For reasons set forth herein and in the Husband's brief on the merits, the Court should deny the Wife's claim to a 43% interest in the Husband's Army retired pay.

Allowing an ex-spouse to claim and successfully take a portion of the former member's Army retired pay is totally inconsistent with and significantly impairs the Congressional plan. Federal law prevents such a result.

Respectfully submitted,

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tion as to Husband's retired pay of § 4803. The lower court was fully apprised that the state statute, as applied, was being assailed as invalid on federal grounds.

[47] *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *United States v. Kimbell Foods*, 440 U.S. 715, 726 (1978).

[48] *See, Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582 (1979).

[49] *United States v. Kimbell Foods, supra*, 440 U.S. at 728.